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No. 82-825

In the Supreme Court of the United States

OCTOBER TERM, 1982

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

SHELL OIL COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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Although respondent acquiesces in our petition for a writ of certiorari (Resp. Br. 9), it nevertheless raises several arguments regarding the propriety of an investigation into its employment practices and the powers of the Commission in general. In view of our suggestion that this case is appropriate for summary reversal, this brief is filed in reply to certain erroneous legal and factual assumptions upon which respondent's arguments are premised.

1. Respondent argues, for the first time, that the EEOC failed to provide notice of the disputed commissioner's charge within the ten-day period imposed by Section 706(b) of Title VII, 42 U.S.C. 2000e-5(b), and suggests that this provides an independent ground for holding the charge

invalid (Resp. Br. 2 n.1).[1] By failing to raise the question in the courts below, respondent has waived any objection to service. In any event, the record demonstrates that service of the charge was timely. Commissioner Norton's charge was issued on September 27, 1979 (Pet. App. 46a), and was filed with the EEOC's St. Louis District Office on October 16, 1979 (Affidavit of Ed Mansfield, at 2 para. 5, Civil No. 81-5020, S.D. Ill.). Respondent admits that it was served with notice ten days later on October 26, 1979 (Resp. Br. 2 n.2).

2. Respondent incorrectly suggests that the commissioner's charge in this case was issued without specific evidence of discrimination (Resp. Br. 2, 9). In so contending, respondent relies on a statistical profile of its employment practices (Resp. Br. 3-4). Respondent states that, as of December 31, 1979, its Wood River workforce was 7.2% black and 7.5% female, compared with an unspecified "appropriate labor market" that was 4.7% black and 8.0% female (*ibid.*). In addition, respondent claims that 12.3% of its Wood River employees hired between July 2, 1965, and December 31, 1979, were black and 9.8% were female (*ibid.*).

Respondent's statistical presentation is entirely immaterial to the existence of the discrimination charged by Commissioner Norton. The charge at issue here alleges that respondent has confined its female employees to office/clerical positions and its black employees to operative and laborer positions (Pet. App. 3a). The undifferentiated total workforce statistics cited by respondent, even if correct, do

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[1]Section 706(b), 42 U.S.C. 2000e-5(b), provides in pertinent part (emphasis added):

> Whenever a charge is *filed* • • • by a member of the Commission, • • • the Commission shall serve a notice of the charge • • • within ten days • • •.

not in any way contradict the charged systemic exclusion of blacks and women from higher-paying positions. Similarly, the fact that respondent may have hired women and blacks as clerical employees or laborers, respectively, is meaningless in the context of the charge, which alleges that the company has failed or refused to recruit, hire, promote, train, select and assign women and blacks for managerial, professional, technical, craft and service worker positions (Pet. 13).[2]

Commissioners' charges are issued under published standards that are applied to an analysis of EEO reporting data and other available information, including individual charge files and data from other administrative agencies (Pet. 5-6, 40a-43a). The statistical data describing the racial and sexual composition of respondent's Wood River Refinery workforce were supplied to the Commission by respondent and clearly provided a basis for a charge of systemic exclusion of blacks from managerial, professional, technical, office/clerical, craft, and service workers positions, and systemic exclusion of women from managerial, professional, technical, craft, operative, laborer and service worker positions.[3]

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[2]Furthermore, respondent's assumption that the appropriate labor market for the Wood River Refinery is 4.7% black and 8.0% female is incorrect. The Wood River Refinery is located in Madison County, Illinois, and is part of the St. Louis Missouri—Illinois Standard Metropolitan Statistical Area (SMSA). The aggregate labor market availability for the SMSA in 1978, undifferentiated by job category, was 13.8% black and 38.0% female (*EEOC 1978 Report: Minorities and Women in Private Industry*, Vol. 2, at 11-280 (Feb. 1980), reproduced as Appendix A, *infra*). The St. Louis SMSA, and not some unspecified region selected by respondent, constitutes the relevant labor market for purposes of the Commission's initial statistical evaluation of respondent's workforce. *Hazelwood School District* v. *United States*, 433 U.S. 299, 308-312 (1977).

[3]The data supplied by respondent, compared with the SMSA availability figures for 1978, are as follows:

SHELL OIL COMPANY, WOOD RIVER REFINERY, EMPLOYMENT CHARACTERISTICS

Source: EEO-1 Reports filed by Shell with the EEOC 1970-1977

YEAR	EEO-1 JOB CATEGORY Managerial		Professional		Technical	
1970						
Total	263		266		168	
Black	0	0%	5	1.9%	3	1.8%
Female	0	0%	4	1.5%	0	0%
1971						
Total	260		236		152	
Black	0	0%	6	2.5%	3	2.0%
Female	0	0%	5	2.1%	0	0%
1972						
Total	266		202		146	
Black	0	0%	5	2.5%	3	2.1%
Female	0	0%	4	2.0%	0	0%
1973						
Total	253		192		148	
Black	0	0%	5	2.6%	4	2.7%
Female	0	0%	4	2.1%	1	0.7%
1974						
Total	242		181		152	
Black	0	0%	5	2.8%	6	3.9%
Female	0	0%	6	3.3%	4	2.6%
1975						
Total	251		162		150	
Black	1	0.4%	5	3.1%	6	4.0%
Female	0	0%	5	3.1%	3	2.0%
1976						
Total	241		102		83	
Black	1	0.4%	6	5.9%	3	3.6%
Female	0	0%	6	5.9%	1	1.2%
1977						
Total	257		97		85	
Black	1	0.4%	3	3.1%	3	3.5%
Female	0	0%	7	7.2%	1	1.2%
1978						
Total	238		94		84	
Black	1	0.4%	5	5.3%	3	3.6%
Female	0	0%	10	10.6%	1	1.2%

PERCENT AVAILABILITY, SAINT LOUIS STANDARD METROPOLITAN STATISTICAL AREA, 1978

Source: EEOC 1978 Report: Minorities and Women in Private Industry, Vol. 2, at II-280 (Feb. 1980)

1978	EEO-1 JOB CATEGORY Managerial	Professional	Technical
Black	**4.3%**	**4.5%**	**13.2%**
Female	**16.9%**	**32.9%**	**39.6%**

EEO JOB CATEGORY CHART (continued)

Craft		Service		Office Clerical		Operative Laborer	
920		40		139		478	
2	0.2%	0	0%	8	5.8%	30	6.3%
0	0%	0	0%	103	74.1%	0	0%
929		30		122		460	
3	0.3%	0	0%	6	4.9%	40	8.7%
0	0%	0	0%	83	68.0%	0	0%
894		29		116		447	
9	1.0%	0	0%	6	5.2%	27	
0	0%	0	0%	77	67.0%	0	0%
840		29		112		448	
9	1.1%	0	0%	5	4.5%	31	6.9%
0	0%	0	0%	75	66.4%	0	0%
815		28		112		476	
7	0.9%	1	3.6%	6	5.4%	47	9.9%
0	0%	0	0%	78	69.6%	4	0.8%
788		25		111		467	
7	0.9%	1	4.0%	7	6.3%	62	13.3%
0	0%	0	0%	77	69.4%	15	3.2%
763		22		96		424	
11	1.4%	1	4.5%	7	7.3%	59	13.9%
0	0%	0	0%	64	66.7%	15	3.5%
793		22		92		395	
18	2.3%	1	4.5%	7	7.6%	61	15.4%
1	0.1%	0	0%	63	68.5%	20	5.1%
763		22		96		422	
19	2.4%	1	4.5%	9	9.4%	66	15.6%
1	0.1%	1	4.5%	68	70.8%	23	5.5%

Craft	Service	Office Clerical	Operative Laborer
8.2%	30.1%	12.1%	21.2%
7.8%	56.7%	81.0%	24.3%

The Commission did not introduce these data below because of its position, to which it adheres, that it is not required to provide such information in order to obtain enforcement of a subpoena issued pursuant to a charge. While these data demonstrate that the Commission could provide the basis for the commissioner's charge in this case, Section 706(b), 42 U.S.C. 2000e-5(b), does not require the Commission to provide the "factual basis" found necessary by the court below. See Pet. 9-16. A subpoena enforcement action should not become, as this one has, a "mini-trial" on the merits of the administrative charge. The lower court's decision, which portends substantial litigation regarding the factual sufficiency of Title VII charges (Pet. 20), improperly interferes with the functioning of the Commission and unduly intrudes the district courts into the EEOC administrative process. *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 242-243 (1980).

Respondent evidently believes that the St. Louis Standard Metropolitan Statistical Area (see note 2, *supra*) is an inappropriate reference for comparison with its labor force, or that its practices are not reflected in the statistical composition of its workforce. Respondent is, of course, free to present its views to the Commission in order to influence the Commission's determination of whether there is reasonable cause to believe the allegations of the charge. Respondent, however, seeks the opportunity to conduct a preliminary trial on the merits of the charge in district court, before the Commission has been permitted access to the documents that could establish or disprove the existence of discrimination in the affected job categories. This Court's decision in *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 242-243 (1980), mandates a different result: "Judicial review of the averments in the Commission's complaints should not be a means of turning prosecutor into defendant before adjudication concludes."

3. Respondent's contention (Resp. Br. 12 n.7) that the commissioner's charge in this case failed to comply with the "date" requirement of Section 706(b), 42 U.S.C. 2000e-5(b), is without merit. July 2, 1965, was specified as the starting date for respondent's alleged violations. This date, contrary to respondent's assertions (Resp. Br. 12 n.7), is not mere "boilerplate." [4] The Commission has used July 2, 1965, only in special circumstances, such as where pre-charge information indicates a history of assignment or promotion discrimination that has been continued and perpetuated by collective bargaining agreements. In such cases, specification of

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[4]The Commission's practice refutes any suggestion that July 2, 1965, is inserted as "boilerplate" into "every case" (Resp. Br. 12 n.7) without reference to special circumstances. Of 139 outstanding commissioners' charges being handled through the Office of Systemic Programs, only 19 specify the effective date of Title VII (July 2, 1965) as the beginning date for the charged discrimination.

the effective date of Title VII as the beginning date of the charged discrimination is appropriate in order to facilitate seniority relief to the full extent permitted by law. The commissioner's charge in this case alleged systematic discrimination in promotion, training, assignment and selection of employees. Respondent has been hiring women and blacks since the effective date of Title VII into this allegedly discriminatory system. In these circumstances, July 2, 1965, is an entirely reasonable and good-faith estimate of the probable time period of respondent's misconduct, and fully satisfies the requirements of Section 706(b). *EEOC* v. *Dean Witter Co.*, 643 F.2d 1334, 1338 (9th Cir. 1980).[5]

Respondent has received all that Section 706(b) requires—a concise statement of what it has allegedly done in violation of Title VII of the Civil Rights Act of 1964. See *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355, 372-373 & n.32 (1977). The "date" requirement of Section 706(b) does not require the technical precision respondent would impose on the Commission. As we noted in our petition (Pet. 13) and as recognized by the Ninth Circuit, "[t]he filing of a charge is the first step in the EEOC administrative process, and understandably, the EEOC may be uncertain about the temporal scope of the challenged practices, especially where a pattern or practice charge is involved." *EEOC* v. *Dean Witter Co.*, *supra*, 643 F.2d at 1338. Respondent is of course entitled to argue to the Commission that it did not commit unlawful acts in the time period charged in this case. Respondent, however, may not claim that it does not know what it is charged with doing.

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[5]There is no substance to respondent's contention that July 2, 1965, is insufficient as a matter of law to provide an employer with notice of the beginning date of its discriminatory practices (Resp. Br. 12-15). If accepted, the argument would mean that the worst offender under Title VII, the employer that had never acted to integrate its segregated workforce after the passage of Title VII, could not be accurately charged under Title VII simply because of the extent of its discrimination.

4. Respondent's remaining contention (Resp. Br. 16-19), that the Commission is not authorized to conduct "audits" of employers, rests upon a misapprehension of Title VII, and is not properly before the Court. Respondent argues that the EEOC may only "investigate and conciliate alleged discrimination brought by and on behalf of employees" (*id.* at 17) and is therefore powerless to act against discrimination unless an individual employee or his representative files a charge of discrimination (*id.* at 7, 20). Employment statistics alone, respondent contends, "cannot be the predominant reason for a charge, nor can they provide a sufficient factual basis in and of themselves" (*id.* at 17 n.13). The court of appeals, however, rejected this argument, holding that statistics are sufficient to support the issuance of a commissioner's charge (Pet. App. 11a). Respondent, moreover, cites no authority in support of its novel suggestion that statistical data are not sufficient support for a commissioner's charge. *Cf. Hazelwood School District* v. *United States*, 433 U.S. 299, 307-308 (1977) (statistical data sufficient to constitute prima facie proof of a pattern or practice of discrimination). The question, in any event, is not before the Court. The court of appeals decided the issue against respondent, and respondent has not petitioned this Court for review.[6]

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[6]Respondent is, of course, entitled "to urge any grounds which would lend support to the judgment below" (*Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 419 (1977)). The court of appeals, however, held that Section 706(b) does not prohibit "the filing of a Commissioner's charge which is based on statistical data obtained by the Commissioner from annual reports" (Pet. App. 11a n.5) and remanded the case for further proceedings based on that premise. Thus, respondent's contention that the Commission lacks authority to issue charges based on statistical audits does not support the judgment below, and is not properly before the Court. *NLRB* v. *International Van Lines*, 409 U.S. 48, 52 n.4 (1972).

CONCLUSION

The petition for a writ of certiorari should be granted. Because respondent's factual assertions are immaterial and do not affect our view that the error of the court of appeals is manifest, we again suggest that the Court may wish to consider summary reversal.

Respectfully submitted.

REX E. LEE
Solicitor General

FEBRUARY 1983

APPENDIX A

EEOC, 1978 Report: Minorities and Women in Private Industry, Vol. 2, at II - 280 (Feb. 1980):

Table 1. Occupational Employment in Private Industry by Race/Ethnic Group/Sex and by Industry for SMSA's with Population of 1,000,000 or more, 1978

St. Louis, Missouri-Illinois

All Industries (2227 units)

Race Ethnic Group/ Sex	Total Employment	Officials and Managrs.	Professionals	Technicians	Sales Workers	Office & Clerical Workers	Craft Workers	Operatives	Laborers	Service Workers
				Number Employed						
All Employees	494,511	56,223	44,960	21,547	52,366	76,215	64,434	100,881	28,616	49,269
Male	306,828	46,742	30,179	13,010	23,620	14,493	59,418	76,798	21,247	21,321
Female	187,683	9,481	14,781	8,537	28,746	61,722	5,016	24,083	7,369	27,948
White	419,220	53,072	41,734	18,401	47,256	65,997	58,370	79,558	20,925	33,907
Male	264,799	44,450	28,374	11,882	21,513	12,683	54,347	61,617	15,287	14,646
Female	154,421	8,622	13,360	6,519	25,743	53,314	4,023	17,941	5,638	19,261
Minority	75,291	3,151	3,226	3,146	5,110	10,218	6,064	21,323	7,691	15,362
Male	42,029	2,292	1,805	1,128	2,107	1,810	5,071	15,181	5,960	6,675
Female	33,262	859	1,421	2,018	3,003	8,408	993	6,142	1,731	8,687
Black	68,371	2,418	2,027	2,843	4,369	9,289	5,256	20,228	7,185	14,836
Male	37,386	1,667	912	942	1,752	1,503	4,355	14,364	5,525	6,366
Female	30,985	751	1,115	1,901	2,617	7,786	901	5,864	1,660	8,470

EEOC, 1978 Report (continued):

Race Ethnic Group/ Sex	Total Employment	Officials and Mangrs.	Professionals	Technicians	Sales Workers	Office & Clerical Workers	Craft Workers	Operatives	Laborers	Service Workers
					Number Employed					
Hispanic	3,850	359	341	115	518	621	526	709	404	257
Male	2,716	309	283	76	248	196	487	589	361	167
Female	1,134	50	58	39	270	425	39	120	43	90
Asian/Pacific Islander	1,959	185	713	148	153	210	104	181	52	213
Male	1,177	160	491	88	69	74	61	89	36	109
Female	782	25	222	60	84	136	43	92	16	104
Amind/Alaskan Native	1,111	189	145	40	70	178	178	205	50	56
Male	750	156	119	22	38	37	168	139	38	33
Female	361	33	26	18	32	141	10	66	12	23
					Participation Rate					
All Employees	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Male	62.1	83.1	67.1	68.4	45.1	19.0	92.2	76.1	74.3	43.3
Female	38.0	16.9	32.9	39.6	54.9	81.0	7.8	23.9	25.8	56.7
White	84.8	94.4	92.8	85.4	98.2	85.6	98.6	78.9	73.1	68.8
Male	53.6	78.1	63.1	55.1	41.1	16.6	86.0	64.1	55.6	28.7
Female	31.2	15.3	29.7	30.3	49.2	70.0	6.3	17.8	10.7	39.1

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EEOC, 1978 Report (continued):

Race Ethnic Group/ Sex	Total Employment	Officials and Mangrs.	Professionals	Technicians	Sales Workers	Office & Clerical Workers	Craft Workers	Operatives	Laborers	Service Workers
				Participation Rate						
Minority	15.2	5.6	7.2	14.6	9.8	13.4	9.4	21.1	26.9	31.2
Male	8.5	4.1	4.0	5.2	4.0	2.4	7.9	15.1	20.8	13.6
Female	6.7	1.5	3.2	9.4	5.7	11.0	1.5	6.1	6.1	17.6
Black	13.8	4.3	4.5	13.2	8.3	12.1	8.2	20.1	25.1	30.1
Male	7.6	3.0	2.0	4.4	3.4	2.0	6.8	14.2	19.3	12.9
Female	6.3	1.3	2.5	8.8	5.0	10.1	1.4	5.8	5.8	17.2
Hispanic	.8	.6	.8	.5	1.0	.8	.8	.7	1.4	.5
Male	.6	.6	.6	.4	.5	.3	.8	.6	1.3	.3
Female	.2	.1	.1	.2	.5	.6	.1	.1	.2	.2
Asian/Pacific Islander	.4	.3	1.6	.7	.3	.3	.2	.2	.2	.4
Male	.2	.3	1.1	.4	.1	.1	.1	.1	.1	.2
Female	.2	•	.5	.3	.2	.2	.1	.1	.1	.2
Amind/Alaskian Native	.2	.3	.3	.2	.1	.2	.3	.2	.2	.1
Male	.2	.3	.3	.1	.1	.1	.3	.1	.1	.1
Female	.1	.1	.1	.1	.1	.2	•	.1	•	.1

EEOC, 1978 Report (continued):

Race Ethnic Group/ Sex	Total Employ-ment	Officials and Mangrs.	Profes-sionals	Techni-cians	Sales Workers	Office & Clerical Workers	Craft Workers	Opera-tives	Laborers	Service Workers
				Occupational Distribution						
All Employees	100.0	11.4	9.1	4.4	10.6	15.4	13.0	20.4	5.8	10.0
Male	100.0	15.2	9.8	4.2	7.7	4.7	19.4	25.0	6.9	7.0
Female	100.0	5.1	7.9	4.6	15.3	32.9	2.7	12.8	3.9	14.9
White	100.0	12.7	10.0	4.4	11.3	15.7	13.9	19.0	5.0	8.1
Male	100.0	16.8	10.7	4.5	8.1	4.8	20.5	23.3	5.8	5.5
Female	100.0	5.6	8.7	4.2	16.7	34.5	2.6	11.6	3.7	12.5
Minority	100.0	4.2	4.3	4.2	6.8	13.6	8.1	28.3	10.2	20.4
Male	100.0	5.5	4.3	2.7	5.0	4.3	12.1	36.1	14.2	15.9
Female	100.0	2.6	4.3	6.1	9.0	25.3	3.0	18.5	5.2	26.1
Black	100.0	3.5	3.0	4.2	6.4	13.5	7.7	29.6	10.5	21.7
Male	100.0	4.5	2.4	2.5	4.7	4.0	11.7	38.4	14.8	17.0
Female	100.0	2.4	3.6	6.1	8.5	24.9	2.9	18.9	5.4	27.3
Hispanic	100.0	9.3	8.9	3.0	13.5	16.1	13.7	18.4	10.5	6.7
Male	100.0	11.4	10.4	2.8	9.1	7.2	17.9	21.7	13.3	6.2
Female	100.0	4.4	5.1	3.4	23.8	37.5	3.4	10.6	3.8	7.9

EEOC, 1978 Report (continued):

Race Ethnic Group Sex	Total Employment	Officials and Mangrs.	Professionals	Technicians	Sales Workers	Office & Clerical Workers	Craft Workers	Operatives	Laborers	Service Workers
				Occupational Distribution						
Asian/Pacific Islander	100.0	9.4	36.4	7.6	7.8	10.7	5.3	9.2	2.7	10.9
Male	100.0	13.6	41.7	7.5	5.9	6.3	5.2	7.6	3.1	9.3
Female	100.0	3.2	28.4	7.7	10.7	17.4	5.5	11.8	2.1	13.3
Amind/Alaskan Native	100.0	17.0	13.1	3.6	6.3	16.0	16.0	18.5	4.5	5.0
Male	100.0	20.8	15.9	2.9	5.1	4.9	22.4	18.5	5.1	4.4
Female	100.0	9.1	7.2	5.0	8.9	39.1	2.8	18.3	3.3	6.4

*Less than 0.05 percent.